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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Mar 29, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DOROTHY DIEDE,

Plaintiff,

v.

DENIS RICHARD MCDONOUGH,  
Secretary, Department of Veterans  
Affairs, and DEPARTMENT OF  
VETERANS AFFAIRS,

Defendants.

No. 2:20-cv-00456-SMJ

**ORDER DENYING JUDGMENT  
ON THE PLEADINGS**

Before the Court, without oral argument, is Defendant's Motion for Judgment on the Pleadings, ECF No. 14. After review of the file, the Court is fully informed and denies the motion.

**BACKGROUND**

Plaintiff alleges that her employer, the Department of Veteran Affairs ("VA"), discriminated against her on the basis of age and gender in May 2013, when it provided her with a Notice of Proposed Removal from her employment due to alleged misconduct. ECF No. 1 at 4–6. Plaintiff brings claims under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967.

*Id.* at 3.

1     **A. Employment and Retirement**

2         In April 2013, the VA’s Behavioral Health Clinic in Wenatchee, WA, where  
3 the Plaintiff was formerly employed as a Social Worker, received complaints from  
4 a patient who had also been recently hired as a VA clinic clerk employee. ECF No.  
5 13-1 at 2. The VA’s Behavioral Health Science services then began an investigation  
6 into the complaint. *Id.* at 3. On May 20, 2013, Plaintiff was issued a Notice of  
7 Proposed Removal from her employment. *Id.* at 4. Around that time, Plaintiff also  
8 prepared her own retirement application materials and, without consultation with  
9 VA personnel, voluntarily submitted her retirement application to VA’s Human  
10 Resources Office. *Id.* In response, the VA allowed Plaintiff to voluntarily retire on  
11 or near June 28, 2013, and did not proceed with formal removal proceedings. *Id.*

12         On July 2, 2013, shortly after her voluntary retirement, Plaintiff submitted a  
13 formal post-retirement charge of discrimination against the VA, and  
14 administratively pursued her claims, first through the EEO complaint process, then  
15 with the U.S. Merit Systems Protection Board (“MSPB”), and then finally again  
16 with the EEOC. *See* ECF 13-1 at 2–10, 12–30, 32–39. On April 16, 2014, a MSPB  
17 Administrative Judge issued a decision, concluding that Plaintiff failed to raise any  
18 non-frivolous allegations. *Id.* at 12–19. Plaintiff appealed, and the full MSPB issued  
19 its Final Order on October 22, 2014, denying the petition for review and affirming  
20 the Administrative Judge’s decision. ECF No. 13-1 at 32–39. Plaintiff did not file a

1 suit in any Federal District Court seeking to challenge this MSPB decision. *See* ECF  
2 Nos. 1, 13.

3 Instead, Plaintiff sought a hearing on her remaining discrimination claims  
4 with an EEOC Administrative Judge, who granted the VA summary judgment on  
5 March 26, 2018. ECF No. 13-1 at 5. Plaintiff then appealed to the EEOC  
6 Commission. ECF No. 13-1 at 2. On August 11, 2020, the EEOC Commission  
7 affirmed the ALJ's decision as a final action. *Id.* With its final decision, the EEOC  
8 also issued Plaintiff a Notice of Right to Sue, which was issued on August 11, 2020.  
9 ECF No. 13-1 at 8–10. Plaintiff admits to receiving this Right to Sue Notice on  
10 August 18, 2020. ECF No. 1 at 6. Pursuant to the EEOC's final decision and Right  
11 to Sue Notice, Plaintiff was notified that she had ninety days from the date of receipt  
12 of the EEOC's Right to Sue Notice in which to timely commence her federal  
13 lawsuit. ECF No. 13-1 at 8.

14 **B. Filing in Federal Court**

15 Plaintiff first attempted to file her complaint in the United States District  
16 Court for the Western District of Washington on November 14, 2020, the eighty-  
17 eighth day after she says she received the Right to Sue Notice. ECF No. 15 at 19.  
18 Plaintiff submitted the complaint and Right to Sue Notice via e-mail to the Clerk's  
19 Office. *Id.* She did not submit the mandatory \$400 filing fee nor submit a IFP  
20 application. *See id.*

1 On Monday, November 16, 2020, a deputy clerk responded to Plaintiff's  
2 e-mail:

3 This message is from the US District Court regarding the complaint  
4 you recently submitted. The complaint will not be filed and your case  
5 will not be opened until the Court receive either the \$400.00 filing fee  
6 or a completed IFP application. The application can be downloaded  
7 from our website at [wawd.uscourts.gov](http://wawd.uscourts.gov) and it is also attached to this  
8 email.

9 If you intend to pay the filing fee, please respond to this email so we  
10 can provide further instruction on how to pay the filing fee.

11 The Court must receive payment or the IFP application within 7 days  
12 or your documents will not be processed, and you will need to resubmit  
13 your case. Please note that the filing date for your case will the date  
14 the Court receives either the filing fee payment or a completed IFP  
application.

15 *Id.* at 18. Plaintiff did not respond until November 24, 2020, writing that she had  
16 been out of town without access to email. She paid the filing fee and the complaint  
17 was filed the same day, more than ninety days after she received the EEOC's Right  
18 to Sue Notice. *See id.*; ECF No. 1.

## 19 **LEGAL STANDARDS**

### 20 **A. Judgment on the Pleadings**

21 Under Federal Rule of Civil Procedure 12(c), a party may move for judgment  
22 on the pleadings "after the pleadings are closed—but early enough not to delay  
23 trial." A district court should grant the Rule 12(c) motion when "the moving party  
24 clearly establishes on the face of the pleadings that no material issue of fact remains

1 to be resolved and that it is entitled to judgment as a matter of law.” *Hal Roach*  
2 *Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989). In  
3 considering a Rule 12(c) motion, a court must accept as true all material allegations  
4 in the complaint and construe those allegations in the light most favorable to the  
5 nonmoving party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).

6 In considering a Rule 12(c) motion, a court generally limits its review to the  
7 pleadings and attachments, documents incorporated by reference, and “facts that  
8 are contained in materials of which the court may take judicial notice.” See  
9 *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999). A  
10 statute of limitations defense may be raised in a motion to dismiss where the running  
11 of the statute is apparent in the pleadings and/or by the judicially noticed records.  
12 *Jablon v. Dean Witter & Co.*, 614 F.3d 677, 682 (9th Cir. 1980); *Conerly v.*  
13 *Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980); Fed. R. Evid. 101,  
14 201.

15 **B. Statutes of Limitations**

16 There are effectively two limitations periods for Title VII and ADEA claims.  
17 First, the claimant must exhaust all administrative remedies by timely filing a full  
18 and complete charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(e)(1);  
19 see also *Jasch v. Potter*, 32 F.3d 1092, 1094 (9th Cir. 2002). This EEO charge must  
20 be filed within 180 days of the alleged unlawful employment event or practice. 42

1 U.S.C. § 2000e-5(e)–(1). Once a claimant exhausts her administrative remedies, she  
2 must receive a Right to Sue Notice and then timely commence an action in the U.S.  
3 District Court. 42 U.S.C. § 2000e-5(f)(1) (Title VII); 29 U.S.C. § 626(e). Once the  
4 claimant has received the EEOC’s Right to Sue Notice, she has ninety days in which  
5 to timely file a civil action for discrimination.

## 6 DISCUSSION

7 Plaintiff submitted her complaint to the Clerk of Court within the statute of  
8 limitations. For the reasons set out below, this is sufficient to satisfy the statute of  
9 limitations, even though Plaintiff did not pay the filing fee or submit an IFP  
10 application before the ninety-day filing deadline.

11 First, the Court acknowledge that there are rebuttable presumptions that the  
12 Right to Sue Notice was sent by mail on the date of its issuance (August 11, 2020)  
13 and that Plaintiff is presumed to have received the notice within three days of the  
14 mailing (August 14, 2020). *See, e.g., Payan v. Aramrk Management Servs. Ltd  
P’ship*, 495 F.3d 1119, 1125–26 (9th Cir. 2007). Plaintiff has not provided sufficient  
15 evidence to rebut those presumptions, and so the deadline to file would be  
16 November 12, 2020, two days before Plaintiff made any attempt to file a complaint.  
17

18 Still, given that the Court must accept as true the allegations in Plaintiff’s  
19 complaint, the Court proceeds as though Plaintiff did not receive the notice until  
20 August 18, 2020. *See* ECF No. 1 at 8. Given this, Plaintiff needed to file her

1 complaint with the Court by no later than November 16, 2020. Here, Plaintiff  
2 submitted her complaint to the proper e-mail address on November 14, 2020.  
3 Although she did not submit the required filing fee or an IFP application, courts  
4 routinely ignore such formalisms when evaluating whether an actually submitted  
5 complaint is barred by the statute of limitations. *See Loya v. Desert Sands Unified*  
6 *School Dist.*, 721 F.2d 279, 281 (9th Cir. 1983) (“[F]or purposes of the statute of  
7 limitations the district court should regard as “filed” a complaint which arrives in  
8 the custody of the clerk within the statutory period but fails to conform with formal  
9 requirements in local rules. This result is wholly consistent with holdings of this  
10 and other courts that a clerk’s refusal to “file” a complaint should not be controlling  
11 for purposes of the statute of limitations.”); *Escobedo v. Applebees*, 787 F.3d 1226,  
12 1228 (9th Cir. 2015) (“[T]he filing date of a complaint is the date it is delivered to  
13 the clerk, whether it is submitted with or without an IFP application.”); *see also*  
14 *Klemm v. Astrue*, 543 F.3d 1139, 1142 (9th Cir. 2008) (“As a general rule, a notice  
15 of appeal is considered filed at the time the clerk received the document”) (citing  
16 *Houston v. Lack*, 487 U.S. 266 (1988)); *Parissi v. Telechron, Inc.*, 349 U.S. 46  
17 (1955) (per curiam) (notice of appeal was filed within the jurisdictional time period,  
18 notwithstanding the fact that the filing fee was not paid until after the deadline to  
19 appeal had passed). As such, the complaint is deemed to have been filed before the  
20 statute of limitations expired. Given this finding, an evaluation of whether equitable

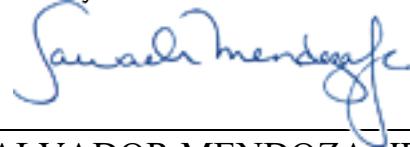
1 tolling applies is unnecessary. The Defendant is not entitled to judgment on the  
2 pleadings.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 1. Defendant's Motion for Judgment on the Pleadings, **ECF No. 14**, is  
5 **DENIED.**

6 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
7 provide copies to all counsel.

8 **DATED** this 29<sup>th</sup> day of March 2022.



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10 SALVADOR MENDOZA, JR.  
United States District Judge  
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